IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 9 OF 2006

Shri Jyoti Laxman Konkar,
Prop. M/s. Kiran Steel Traders,
Indian Inhabitant of Goa,
having his address at Navelim,
Salcete, Goa - 403 707. ... Appellant

versus

The Commissioner of Income Tax,
having his office at
Income Tax Office,
Near Patto Bridge,
Panaji, Goa. ... Respondent

Mr. S. V. Pikale with Mr. S. S. Gurav, Advocates for the Appellant.

Mr. S. R. Rivonkar, Government Advocate for the Respondent.

CORAM : SMT.RANJANA DESAI &
N. A. BRITTO, JJ.

DATE : 10TH JULY, 2006.

JUDGMENT(Per N. A. BRITTO, J.)

This is an appeal filed by the assessee under Section

260(A)(1) of the Income Tax Act, 1961(Act, for short).

2. Heard Mr. S. V. Pikale, the learned Counsel on behalf of the appellant/assessee and Mr. S. R. Rivonkar, the learned Government Advocate on behalf of the respondent/Revenue.

3. The assessee had filed a return on 25-11-1999 for the Assessment Year 1999-2000 declaring an income of Rs.7,40,510/-. Not satisfied therewith, the Assessing Officer carried out a survey under Section 133A of the Act and during the survey found that there was a discrepancy in stock to the tune of Rs.18,28,706/- which was brought to the notice of the assessee, and, the assessee filed a revised return disclosing additional income of Rs.18,28,706/- and the Assessing Officer found that the said income was suppressed by the assessee but the said revised return was finalized but at the same time a notice under Section 271(1)(c) of the Act to impose penalty was issued to the assessee and which was disposed of by Order dated 25-5-2001 and a penalty of Rs.2,75,000/- was imposed upon the assessee. In the said Order, the Assessing Officer observed that the assessee had come forward with the revised return out of

compulsion since suppression of income was detected in survey carried out under Section 133A and, therefore, the act of filing a revised return was not voluntary. He also found that the assessee had deliberately attempted to conceal the income.

4. The assessee carried an appeal to the Commissioner of Income Tax which came to be disposed of by Order dated 21-9-2001. In allowing the assessee's appeal, the Commissioner of Income Tax relied upon the decision in the case of **C.I.T.** v. **Suresh Chandra Mittal**(2000 ITR 124) as affirmed by the Supreme Court in **C.I.T.** v. **Suresh Chandra Mittal**(2001 ITR 9). The Revenue carried an appeal to the ITAT(Income Tax Appellate Tribunal) and ITAT by Order dated 2-1-2006 was pleased to allow the same. In disposing of the said appeal of the Revenue, the ITAT observed that whether an assessee had concealed income or not was a matter of fact and one need not go into the gamut of cases which were decided on the facts of the respective cases. The ITAT also observed that the filing of the second return(sic. revised) spoke loudly about the conduct of the assessee which could not be said anything else than mala fide, (sic. dishonest) and filing of another return

did not obliterate the fact of the earlier mala fide(sic. dishonest) return and that the assessee had furnished wrong particulars of the stock with a view to suppress the income and, therefore, was liable to be penalized and thus the Assessing Officer was justified in levying the minimum penalty in view of the subsequent conduct of the assessee filing another return and paying the due tax.

5. At the time of admission, Mr. S. V. Pikale, the learned Counsel on behalf of the assessee has submitted that the assessee was entitled to file a revised return in terms of Section 139(5) of the Act at any time as prescribed therein and having filed the same and the Assessing Officer having accepted the same there was no room to levy any penalty.

6. Reliance has been placed on behalf of the Revenue by Mr. S. R. Rivonkar, learned Government Advocate, on the judgments in the case of **Century Flour Mills Ltd.** v. **Commissioner of Income Tax**((2000) 162 CTR(SC)0407),

Commissioner of Income Tax v. **Rhone Poulenc Ltd.**(246 ITR 699) and **C.I.T.** v. **K. P. Sampath Reddy**(197 ITR 232). In the first case, the Apex Court observed that the Tribunal having arrived at the finding of concealment of income on the basis of the material on record, no question of law arose, reference of which could be called for. In the second case, the Division Bench of this Court held that whether there was concealment of income or not is a finding of fact and, therefore, no substantial question of law arose on the facts of that case. In the third case, the Karnataka High Court, in a fact situation very similar to the facts of the case at hand, observed that the concealment of the income in the return filed by the assessee was a glaring fact. It further held that the assessee had to thank himself that the Income Tax Officer levied the limited penalty only.

7. In the case of **K.C. Builders** v. **Assistant Commissioner of Income Tax** ((2004) 265 ITR 562) relied upon on behalf of assessee, the Supreme Court stated that the word "concealment" inherently carried with it the element of mens rea and that the fact that some figure or some particulars have been

disclosed by itself, even if it takes out the case from the purview of non-disclosure, would not by itself take out the case from the purview of furnishing inaccurate particulars and mere omission from the return of the item of receipts amounts neither to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances are found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In **Bharat Rice Mill** v. **Commissioner of Income Tax**((2005)278 ITR 599) a Division Bench of Allahabad High Court reiterated the view that mens rea is an important factor in relation to concealment of income. That was a case where there was non disclosure of certain profits due to mistake and, therefore, it was held that penalty could not be imposed under Section 271(1)(c) of the Act. In the case of **West Bengal State Electricity Board** v. **Deputy Commissioner of Income Tax and another** ((2005)278 ITR 218 (Cal)) a Division Bench of Calcutta High Court held that the question regarding jurisdiction of the Assessing Officer can be raised for the first

time before the Tribunal.

8. In our view, the Assessing Officer as well as the ITAT having come to the conclusion that the assessee had filed the initial return dishonestly with a view to conceal the income and the revised return was filed out of compulsion, i.e. after having found that the assessee had concealed the income and filed a false return with a view to avoid tax liability in our view, no substantial question/s of law arises in this case either in the manner formulated, on behalf of the assessee in the memorandum of appeal or otherwise. The Commissioner of Income Tax allowed the appeal of the assessee by mis-applying the said decision of the Division Bench of Madhya Pradesh High Court which had no relevance to the fact situation prevailing in the case at hand. Whether there is concealment of income or not has to be decided with reference to the facts of a given case and the fact finding authorities under the Act having come to the conclusion that in the facts of the case, the assessee had concealed the income initially with a view to avoid the payment of tax, we are, of the view that no substantial question of law is

involved in this case requiring the admission of the appeal. Consequently the same is hereby dismissed.

SMT. RANJANA DESAI, J.

N. A. BRITTO, J.

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